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91-2043

No. _____

Supreme Court, U.S.
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IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1991

PRICELESS SALES AND SERVICE, INC., *Petitioner*,

v.

UNITED STATES OF AMERICA, *Respondent*.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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June 18, 1992

QUESTION PRESENTED

Where a regulation mandates that as part of a surety approval process, the government must receive a certificate executed by an officer having personal knowledge of the proposed surety and his assets, if the contracting officer learns that the certificate was not made with personal knowledge, will his act in approving the surety anyway be shielded by the discretionary function exception to the Federal Tort Claims Act?

LIST OF PARTIES

The parties to the proceedings below were Priceless Sales and Service, Inc. and the United States of America. There are no other listings applicable under Rule 29.1

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IN THE SUPREME COURT OF THE UNITED STATES

October Term

PRICELESS SALES AND SERVICE, INC., *Petitioner*

v.

UNITED STATES OF AMERICA, *Respondent*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

The Petitioner, Priceless Sales and Services, Inc., respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fourth Circuit, entered in the above entitled proceeding on April 1, 1992.

OPINIONS BELOW

The unpublished, Per Curiam opinion of the Court of Appeals for the Fourth Circuit is reprinted in the appendix hereto. The Memorandum Opinion of the United States District Court for the District of Maryland (Harvey, J.) is reprinted in the appendix.

JURISDICTION

Invoking federal jurisdiction under 28 U.S.C. §§ 1346(b), 2671, et. seq., the Federal Tort Claims Act, the Petitioner filed this suit in the United Sates District Court for the District of Maryland. After an adverse ruling, the Petitioner took a timely appeal to the United States Court of Appeals for the Fourth Circuit. An adverse ruling was issued by that Court on April 1, 1992.

The jurisdiction of this Court to review the judgment of the Fourth Circuit is invoked under 28 U.S.C. § 1254 (1).

STATUTES INVOLVED

The Statutes involved in this case are the Federal Tort Claims Act (28 U.S.C. §§ 1346 (b), 2671, et. seq.), the Discretionary Function Exception to the Federal Tort Claims Act (28 U.S.C. § 2680 (a)), Code of Federal Regulations 48 C.F.R. § 28.202-2 and the Miller Act (40 U.S.C. 270a. These statutes are reproduced in the appendix.

STATEMENT OF THE CASE

(Note: The following facts are derived from the Memorandum Opinion filed by the Honorable Alexander

Harvey, II, District Judge in the District Court for the District of Maryland).

In 1988, Jennings International Corporation ("Jennings") was awarded a contract for improvements to the Suitland Parkway, a Federal highway in Maryland. Pursuant to the Miller Act, Jennings was required to provide the government with a payment bond for the protection of subcontractors providing labor and materials to that project. According to the applicable regulations, Jennings was also required to provide two sureties whose net worth would equal or exceed the penal sum of the bond. 48 C.F.R. § 28.202-2 To fulfill this requirement, Jennings submitted affidavits of two proposed individual sureties (John Rich and Emmett Harper), each of whom had signed an Affidavit of Individual Surety (Standard Form 28) On the reverse side of each of those Affidavits of Individual Surety was a Certificate of Sufficiency which was executed by a Mr. Raul Corpion, a banking officer in Texas. The instructions for the execution of the Certificate of Sufficiency required that the person executing it have personal knowledge of the assets claimed to be owned by the person who executed the Affidavit.

The Affidavit executed by Mr. Rich alleged that he had assets worth $52,044,069 of which $52,000,000 was the alleged value of the stock he claimed to own in a corporation known as Tennessee Land & Development Corporation. Mr. Harper alleged that he had $8,800,200 in assets, of which $8,630,400 consisted of Tennessee Land & Development Corporation stock.

In order to determine the suitability of the proposed individual sureties, the FHA conducted an investigation designed to verify the ownership and the value of the assets claimed in the affidavits. Peggy DeWeese was the employee who undertook the investigation. Ms. DeWeese testified that she called Mr. Corpion directly and learned that he did not have personal knowledge of the assets of Mr. Rich or Mr. Harper, and that he had relied on the representations of Mr. Harper as to the value of the Tennessee Land & Development Corporation stock. In addition, Mr. Roy Crawford, who was then Ms. DeWeese's supervisor, testified that the policy of the FHA required that when stock in a closely held corporation was listed as the primary asset, the agency required that a certified financial statement of that corporation be submitted. No

such certified statement was obtained. The only statement obtained by Ms. DeWeese was a financial statement prepared by Emmett Harper, and that statement does not purport to be a certified statement. Mr. Harper's "brief resume" does not allege that he is a certified public accountant either.

Notwithstanding the fact that Mr. Corpion acknowledged that he had no personal knowledge of the assets of Messrs. Rich and Harper, and notwithstanding the fact that the FHA had not received a certified financial statement on Tennessee Land & Development Corporation, the contracting officers approved Messrs. Rich and Harper to act as individual sureties. Jennings defaulted in payment to the Plaintiff and when the Plaintiff sought to recover against the bond, the alleged assets (and the individual sureties themselves) proved worthless.

The Plaintiff brought an action under the Federal Tort Claims Act 28 U.S.C. §§ 1346 (b), 2671, et. seq. (FTCA) seeking to recover for the negligence of the government in approving the individual sureties despite the government having learned that the Certificates of Sufficiency were improperly executed and despite the

failure of the government to obtain the document its own policy required it to obtain.

Trial was held on March 27, 1991. After the parties submitted post-trial memoranda, the Trial Judge ruled that the discretionary function exception to the federal Tort Claims Act, 28 U.S.C. § 2680 (a) barred the suit by the Plaintiff and entered judgment for the government for costs. The Fourth Circuit Court of Appeals, in an unpublished, Per Curiam opinion, affirmed on April 1, 1992. This Petition for a Writ of Certiorari is based upon that affirmance.

REASONS FOR GRATING THE WRIT

I.

The Fourth Circuit's holding is in direct conflict with the holding of this Court in *Berkovitz v. United States*, 486 U.S. 531 (1988) and would effectively allow each government employee to dispense with regulatory mandates and create his own approval process.

In direct contrast to the holding of this Court in *Berkovitz v. United States*, 486 U.S. 531 (1988), the Fourth Circuit has promulgated a rule of law that states that when a regulation mandates that a specific document, having specific required contents, be filed as part of an approval process, an employee, charged with

implementing those approval regulations, upon acquiring actual knowledge that the required contents are missing, may create his own, substitute approval standards. Such a profound departure from this Court's exposition of the applicability of the discretionary function exception to the Federal Tort Claims Act merits this Court's attention.

There is no dispute, and the Fourth Circuit cited the applicable regulatory language, that in order to qualify as an individual surety in support of a government contract, that proposed individual had to submit an affidavit showing his net worth, and that affidavit must have been accompanied by a certificate of sufficiency which was signed by a person who had personal knowledge of the proposed individual surety and of his assets, so that he could verily confirm that the statements made in the affidavit were true. And so important was this verification, that the regulatory body charged with promulgating this regulation even went so far as to list and limit the categories of who could execute such a certificate. And that list includes bank officers, judges, United States District Attorneys, Postmasters, certain internal revenue officials and other "officers" of the United States as the applicable

department would deem acceptable. After all, under the Miller Act, 40 U.S.C. § 270a, the traditional protection afforded sub-contractors working on government projects, since they could not obtain mechanics liens to protect their interests, was a requirement that the general contractor provide a payment bond from a surety company. This regulation was changing that fundamental and important protection by allowing individuals to act as the sureties - a dangerous proposition indeed if the individuals turned out to be assetless. Accordingly, the regulators deemed that if an individual person proposed to act as the surety, an independent and inherently reliable and trustworthy officer's confirmation of the information being provided by that individual must accompany the application.

The Fourth Circuit supported its conclusion by stating on page 6 of its Per Curiam Opinion,

> *Moreover, once it was learned that Corpion lacked personal knowledge of the value of the sureties' assets, the FHA undertook its own investigation. What additional information the FHA sought and how the FHA chose to evaluate this information was wholly within the discretion of the FHA, since there is no requirement that the FHA investigate persons proposed as sureties.*

The Fourth Circuit's support for its holding vis-a-vis the discretionary function exception to the FTCA was limited to one passing reference to *United States v. Gaubert*, 111 499 U.S.____ (1991). That case is completely inapposite to the present case because this case does not deal with the "day to day operations" of a business taken over by the government. And even in *Gaubert*, supra, Justice White, speaking for this Court, after reviewing the three major discretionary function exception cases [*Dalehite v. United States*, 346 U.S. 15 (1953); *United States v. Varig Airlines*, 467 U.S. 797 (1984); *Berkovitz, supra*] stated explicitly that the shield of the discretionary function exception only applies to functions which involve discretion. That is to say, if the act complained of is one which the employee had discretion to do or not to do, the exception applies. If the act is one which the employee had no discretion over, the exception does not apply.

This case was never about whether the government had to investigate the individual sureties before approving them. This case was and is about whether, once having elected to conduct an investigation, the government employee, who is not the policy maker, can

learn that a mandatory part of the filing is missing and then proceed anyway, creating substitutes for the regulations' requirements. *Gaubert, supra,* did not say that, *Varig, supra,* and *Dalehite, supra,* did not say that, and *Berkovitz, supra,* specifically said the employee could not do that. The Petitioner submits that review of the matter by this Court is essential to avoid a wholesale abolition of *Berkovitz, supra,* in the Fourth Circuit.

II.

The decision by the Fourth Circuit is of vital importance to the general public because the bonding required under the Miller Act is the only protection and redress suppliers of labor and material on government projects have for non-payment, and to destroy that protection would dramatically impact the ability of the government to obtain responsible, willing suppliers.

In view of the fact that suppliers of labor and materials to government projects are not afforded the ability to attach the property which houses their labors or materials in the same manner as they can in non-governmental projects (under mechanics lien laws), the subcontractor who provides labor and material to government projects must rely upon the knowledge that

the law requires the general contractor to be bonded. The law provides that those who would use individuals as sureties instead of corporate, regulated and approved bonding companies must use only individuals whose net worth exceed the amount of the bond. And while a subcontractor must make a leap of faith to hope that the government will do an adequate job of investigating and verifying that the type of scam which took place in this case (and for which, incidentally, Messrs. Rich and Harper have since been indicted) will not take place, it is of vital importance that this Court at least make absolutely clear that when the government fails to follow its own regulations, which are designed to protect the public, it cannot hide under the discretionary function shield. In Berkovitz, supra this Court, in footnote 10, alluded to the common sense principal that to merely accept papers for filing, without determining that their contents comply with the mandatory regulation will not shield the government from tort liability. And if that approval of a product based on a mere filing without any review would be tortious, how can the Fourth Circuit, or any Court expect that an investigation, although not required, but performed nonetheless, which produces

actual knowledge that the papers are false would not be actionable? Yet that is precisely what the Fourth Circuit has said, and it is therefore of vital importance, in view of the fact that the Fourth Circuit acted in precise conflict with that footnote, that this Court now take the extra step to confirm that that principal was not mere Dicta. Rather it was an integral part of the ruling and the law which was being set forth in Berkovitz, and its principal should be follwed when the government fails to adhere to its own mandatory regulations.

For if contracting officers, who are charged with implementing and not formulating policy, and who are accountable to no one, are able to change contracting regulations, write their own standards or dispense with mandatory requirements, then thousands upon thousands of suppliers should rightfully be wary of dealing with the United States government because the regulations themselves will be meaningless and the sub-contractors will be ready targets for fraud when they provide labor and materials but don't get paid.

This Court attempted several times in *Gaubert, supra*, to differentiate between discretionary acts and non-discretionary acts; between policy makers and policy

implementers. In short, the Fourth Circuit's holding would turn a regulation designed to prevent fraud upon sub-contractors, into a regulation which winks at fraud and looks the other way by allowing fraud minded individual sureties to get themselves approved without providing the necessary safeguards which the policy makers determined were needed to stop them. It is unfortunate for suppliers that there are no verification and investigation requirements to be followed in approving sureties. The least that can be expected is that those minimal requirements that do exist will be followed.

CONCLUSION

For the reasons set forth herein, the petition for certiorari should be granted so that this Court can ratify once and for all that non-discretionary acts taken by policy implementers, in violation of the mandatory regulations they are supposed to be implementing, are not shielded by the discretionary function exception, and that a contracting officer's acquiring actual knowledge that a required filing submitted as part of an approval

process is false or fraudulent, in and of itself, removes all discretion to render an approval of an individual surety.

Respectfully submitted,

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APPENDIX

1. Opinion of the Fourth Circuit Court of Appeals - Per Curiam dated April 1, 1992 **1a - 6a**

2. Memorandum Opinion - United States District Court for the District of Maryland (Harvey, J.) Dated May 10, 1991. **7a - 25a**

3. 48 C.F.R. § 28.202-2 **26a**

4. 28 U.S.C. § 2680(a) - the Discretionary Function Exception to the Federal Tort Claims Act. **27a**

5. Note: The applicable portions of the Miller Act (40 U.S.C. § 270a are reproduced in the Opinion of the Fourth Circuit Court of Appeals)

UNPUBLISHED

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

PRICELESS SALES AND SERVICE, INCORPORATED,
Plaintiff-Appellant,

v.

UNITED STATES OF AMERICA,
Defendant-Appellee.

No. 91-2550

Appeal from the United States District Court
for the District of Maryland, at Baltimore.
Alexander Harvey, II, Senior District Judge.
(CA-90-828)

Argued: February 7, 1992

Decided: April 1, 1992

Before RUSSELL, HALL, and PHILLIPS, Circuit Judges.

Affirmed by unpublished per curiam opinion.

COUNSEL

ARGUED: Bruce Elliot Kauffman, KAUFFMAN & FORMAN, P.A., Towson, Maryland, for Appellant. Geoffrey Robert Garinther, Assistant United States Attorney, Baltimore, Maryland, for Appellee. **ON BRIEF:** Jeffrey L. Forman, KAUFFMAN & FORMAN, P.A., Towson, Maryland, for Appellant. Richard D. Bennett, United States Attorney, Baltimore, Maryland, for Appellee.

Unpublished opinions are not binding precedent in this circuit. See I.O.P. 36.5 and 36.6.

OPINION

PER CURIAM:

Appellant Priceless Sales and Service, Inc. (Priceless), a subcontractor on a Federal Highway Administration (FHA) construction project, brought suit against the United States under the Federal Tort Claims Act, 28 U.S.C. §§ 1346(b), 2671 *et seq.* (FTCA), to recover from the Government the $95,244.04 in losses it sustained when Jennings International Corporation (Jennings), the now-bankrupt general contractor for the project, failed to pay Priceless for the materials and labor Priceless supplied for the project. Priceless sought to recover these losses from the United States on the ground that federal contracting officers acted negligently in approving two individuals as sureties for the payment bond that Jennings was required by law to provide, and that the Government was therefore liable to Priceless for its losses when Jennings failed to pay and both the payment bond and the sureties supporting it proved to be essentially worthless. After a bench trial, the district court ruled that the federal contracting officers in question were performing a discretionary function when they determined the acceptability of the individual sureties, and consequently, the Government was not subject to suit under the FTCA, even if the federal contracting officers performed this discretionary function negligently. We agree and affirm.

I

In 1988, Jennings was awarded a $5,000,000 construction contract by the FHA for the making of improvements to the Suitland Parkway, a federal highway located in Prince George's County, Maryland. Pursuant to the Miller Act, 40 U.S.C. § 270a,[1] Jennings, as general con-

[1] 40 U.S.C. § 270a provides:

> Before any contract, exceeding $25,000 in amount, for the construction, alteration, or repair of any public building or public work

tractor for the project, was required to provide the Government with a $2,500,000 payment bond for the protection of subcontractors furnishing labor and materials for the project. In addition, Jennings was required by government regulation[2] to provide two sureties, either corporate or individual, each of whose net worth would equal or exceed the penal amount of the bond. The sureties were required to submit affidavits attesting to their present assets, liabilities, and net worth, and supported by certificates of sufficiency.[3]

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of the United States is awarded to any person, such person shall furnish to the United States . . . [a] payment bond with a surety or sureties satisfactory to [the officer awarding the contract] for the protection of all persons supplying labor and material in the prosecution of the work provided for in said contract for the use of each such person. . . . Whenever the total amount payable by the terms of the contract shall be more than $5,000,000 the said payment bond shall be in the sum of $2,500,000.

[2]The applicable regulation, 48 C.F.R. § 28.202-2, provides:

(a) Individual sureties are acceptable for all types of bonds except position schedule bonds. The contracting officer shall determine the acceptability of individuals proposed as sureties. At least two individual sureties must execute the bond and the net worth of each individual must equal or exceed the penal amount of the bond. Contracting officers shall consider the number and amounts of other bonds upon which a proposed individual surety is bound, and the status of the contracts for which such bonds were furnished, in determining the acceptability of the individual surety. . . .

(b) Each individual surety shall execute Standard Form 28. The information provided is helpful in determining the net worth of proposed individual sureties.

[3]"The certificates of sufficiency shall be signed by an officer of a bank or trust company, a judge or clerk of a court of record, a United States district attorney or commissioner, a postmaster, a collector or deputy collector of internal revenue, or any other officer of the United States acceptable to the department or establishment concerned." Standard Form 28 (Affidavit of Individual Surety). The person signing the certificate of sufficiency certifies that "the surety named herein is personally known to me; that, in my judgment, said surety is responsible, and qualified to act as such; and that, to the best of my knowledge, the facts stated by said surety in the foregoing affidavit are true." *Id.*

Jennings had John B. Rich and Emmett Harper submit to the FHA the affidavits of surety required to execute the payment bond. The affidavits showed that the principal assets of both Rich and Harper consisted of their interests in the Tennessee Land & Development Corporation (TLDC), which purportedly owned large tracts of land in Tennessee. Rich's affidavit stated that he owned 699,500 shares of stock in TLDC, valued at $52,000,000, and Harper's affidavit stated that he owned 116,000 shares of stock in TLDC, valued at $8,630,400. Raul J. Corpion, president of Crown Savings and Trust, Dallas, Texas, signed certificates of sufficiency for both Rich and Harper.

Peggy DeWeese, the FHA contracting officer assigned to make the initial determination of the acceptability of Rich and Harper as sureties for the Jennings payment bond, stated at trial that the FHA decided to investigate the value of the sureties' stock in TLDC because if verified, it in itself would substantially exceed the penal amount of the payment bond. In the course of her investigation, DeWeese contacted Raul Corpion, the bank officer who had executed the certificates of sufficiency, and learned from him that he had no personal knowledge of the value of the TLDC stock, but relied instead upon representations made by the sureties themselves. It was then that DeWeese and her superiors decided to obtain from Rich and Harper additional documentation of their net worth, particularly with reference to their ownership of the TLDC stock and the value of the stock itself. The FHA requested and the sureties provided copies of representative stock certificates, a log of stock issuance, a balance sheet of the corporation, various deeds covering real estate held by TLDC, and a real estate appraisal. Although there were discrepancies in the documentation —the affidavit figures for the value of the TLDC stock were lower than the TLDC balance sheet figures, the real estate appraisal indicated some 100,000 fewer acres than the deeds purported to transfer to TLDC, and some of the deeds indicated that the fair market value of the land as only $10,000—DeWeese and her superiors concluded from the documentation that the proposed sureties were acceptable. Their determination was then reviewed by the Contract Review Board of the FHA, which concurred that Harper and Rich were acceptable sureties. As it turned out, however, the assets pledged by Harper and Rich were essentially worthless, and as a result, with Jenning now in bankruptcy, Priceless has not been paid

for the labor and materials it supplied for the Suitland Parkway project.

II

Congress has provided that the provisions of the FTCA "shall not apply to . . . [a]ny claim . . . based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused." 28 U.S.C. § 2680(a). In *United States v. Gaubert*, 111 S. Ct. 1267 (1991), the Supreme Court held that an FTCA action could not be brought against the Government seeking recovery of losses resulting from decisions made by officials of the Federal Home Loan Bank Board in operating a failing thrift institution. "Day-to-day management of banking affairs," the Court concluded, "like the management of other businesses, regularly requires judgment as to which of a range of permissible courses is the wisest." *Id.* at 1275. Similarly, in its day-to-day operations, the FHA exercises judgment in considering the acceptability of sureties for bonds covering federal highway projects. While the FHA contracting officers charged with this task are required by 48 C.F.R. § 28.202-2 to "determine the acceptability" of the individual sureties, nothing in the regulation specifies what steps these officers must take in doing so.[4] Consequently, the determination of acceptability is wholly within the discretion of the contracting officers, and they may go about this discretionary function as they, in their judgment, consider appropriate.

At their discretion, then, the contracting officers in the present case requested additional information from the sureties, evaluated this information, and made the decision that the sureties were acceptable. Priceless claims, however, that once it was learned that Corpion, the bank officer, did not have personal knowledge of the value of the sureties' assets, the FHA was required to reject the sureties, but Price-

[4]Except that contracting officers "shall consider the number and amounts of other bonds upon which a proposed individual surety is bound, and the status of the contracts for which such bonds were furnished, in determining the acceptability of the individual surety." 48 C.F.R. § 28.202-2(a). This requirement is not at issue in the present case.

less can point to no nondiscretionary duty or function that the FHA violated—that is, no regulation requiring the FHA, under these circumstances, to reject Harper and Rich as sureties. Moreover, once it was learned that Corpion lacked personal knowledge of the value of the sureties' assets, the FHA undertook its own investigation. What additional information the FHA sought and how the FHA chose to evaluate this information was wholly within the discretion of the FHA, since there is no requirement that the FHA investigate persons proposed as a sureties. And to the extent that the FHA may have been negligent in carrying out its discretionary function of accepting Harper and Rich as sureties, the negligent performance of a discretionary function does not subject the Government to liability under the FTCA. *Red Lake Band of Chippewa Indians v. United States*, 800 F.2d 1187, 1194 (D.C. Cir. 1986).

We conclude, therefore, that the FHA contracting officers here were exercising their discretion when they approved Rich and Harper as individual sureties under the required payment bond. The district court therefore properly held that this action is barred by the discretionary function exception to the Federal Tort Claims Act set forth in 28 U.S.C. § 2680(a).

AFFIRMED

IN THE UNITED STATES DISTRICT

COURT FOR THE DISTRICT OF MARYLAND

PRICELESS SALES AND SERVICE, INC.	*	CIVIL NO. H-90-828
vs.	*	
UNITED STATES OF AMERICA	*	

* * * * * * * *

MEMORANDUM OPINION

A subcontractor which supplied labor and materials to a general contractor engaged by the federal government to perform a highway construction project has here sued the United States under the Federal Tort Claims Act, 28 U.S.C. §§ 1346(b), 2671, et seq. (hereinafter "the FTCA"). Suit has been brought by Priceless Sales & Service, Inc. (hereinafter "Priceless"), a Maryland corporation with its principal place of business in Baltimore, Maryland. Seeking to recover $95,244.04 from the federal government, plaintiff has alleged that a federal contracting officer acted negligently in approving two individuals as sureties for the payment bond required by law for government contracts and that therefore the

government is liable to it for the losses sustained by plaintiff when it was not paid by the general contractor.

Before any discovery had been undertaken in the case, defendant filed a motion to dismiss the complaint contending that plaintiff had not exhausted its administrative remedies under the FTCA and that the complaint did not state a proper claim because its exclusive remedy in the case lay only under the provisions of the Miller Act, 40 U.S.C. § 270a et seq. In a Memorandum and Order dated August 9, 1990, the Court denied defendant's motion, concluding that the issues presented could not be finally Findings of fact and conclusions of law pursuant to Rule 52(a), F.R.Civ.P., are contained in this Memorandum Opinion whether or not so characterized. In resolving the issues of fact, due regard has been given to the credibility of the witnesses and the weight their testimony deserves.

I

Facts

In 1988, Jennings International Corporation (hereinafter "Jennings") was awarded a $5,000,000 construction contract by the Federal Highway Administration (hereinafter "the FHA) for improvements

to the Suitland Parkway, a federal highway located in Prince George's County, Maryland. Pursuant to provisions of the Miller Act, Jennings, as general contractor, provided the government with a payment bond in the amount of $2,500,000 given for the protection of subcontractors furnishing labor and materials for use on the project. According to the applicable government regulations, Jennings was also required to furnish two sureties, either corporate or individual, whose net worth would equal or exceed the penal amount of the bond. To fulfill this requirement, Jennings submitted affidavits of two proposed individual sureties, together with a Certificate of Sufficiency executed by the officer of a banking institution located in Dallas, Texas. After an investigation, the FHA found the sureties to be acceptable and awarded the contract to Jennings.

Between December of 1988 and May of 1989, plaintiff supplied temporary traffic control devices to Jennings for use on the Suitland Parkway project. Jennings defaulted on its contract with the government and is now bankrupt. It is not disputed that the purported assets of the sureties are essentially valueless and that plaintiff has not been paid for the labor and

materials which it supplied to the general contractor. In this suit, plaintiff seeks under the FTCA to recover from the government the full amount owed it by Jennings.

Affidavits of individual surety were submitted to the FHA by John B. Rich and Emmett Harper. The Certificates of Sufficiency for both affidavits were signed by Raul J. Corpion as President of Crown Savings and Trust in Dallas, Texas. As shown by their affidavits, the principal assets of Rich and Harper consisted of their interests in Tennessee Land & Development Corporation (hereinafter "Tennessee Land & Development"), which purportedly owned large tracts of land in the State of Tennessee. The affidavit of John Rich stated that he owned 699,500 shares of stock in Tennessee Land & Development valued at $52,000,000.00. Rich's other assets were listed as $5,940.00 in cash, $25,000.00 in home furnishings and fixtures, $9,260.00 in notes receivables, $4,500.00 as the value of an automobile, and $7,500.00 as the value of a travel trailer.

The affidavit of Emmett Harper stated that he owned 116,000 shares of stock in Tennessee Land & Development at a value of $8,630,400.00. Harper's other assets were listed as $20,000.00 in stock, $5,400.00 in

cash, $15,000.00 in accounts receivables, $80,000.00 in business and home furnishings and fixtures, and $20,000.00 as the value of an automobile.

According to the testimony of Peggy DeWeese, an employee of the FHA who had been assigned to make the initial determination of the acceptability of the individual sureties, the FHA decided to investigate the net worth of Rich and Harper only with respect to their holdings in Tennessee Land & Development. The FHA made this decision because the value of the sureties' stock in Tennessee Land & Development, if verified, would substantially exceed the penal amount of the bond, as required by the regulations.

In the course of her investigation, DeWeese telephoned Raul Corpion, the bank officer who had executed the Certificate of Sufficiency. Corpion stated that he had no personal knowledge of the value of the assets of the sureties but that he had relied upon representations made by Emmett Harper concerning the value of shares of stock in Tennessee Land & Development. DeWeese also telephoned a local brokerage company which was not able to verify the value of the stock.

It was then decided by DeWeese and her superiors to request additional documentation of the net worth of the sureties with reference both to their ownership of the stock and to the value of the stock itself. Copies of representative stock certificates, a log of stock issuance, a balance sheet of the corporation, various deeds covering real estate held by Tennessee Land & Development, and a real estate appraisal were requested and provided by the sureties. This information was reviewed by DeWeese and her supervisors, Roy Crawford and Dave Webber. All three concluded from the documentation supplied that the sureties were acceptable. Their determination was then reviewed by the Contract Review Board of the FHA, which concurred in the determination that Rich and Harper were acceptable sureties.

According to plaintiff, inconsistencies in the documents procured by DeWeese, Crawford, and Webber should have led them to reject Rich and Harper as individual sureties. For example, the balance sheet of the corporation indicated that the net worth of Tennessee Land & Development was $241,017,647. Assuming this figure to be correct, both Rich and Harper had grossly understated the value of their stock in their affidavits.

Rich's affidavit indicated that his shares of stock were worth some $52 million, while the figures on the balance sheet would suggest that his stock would be worth approximately $155 million. At trial, DeWeese testified that this inconsistency gave her no cause for concern because she believed that Rich, in preparing his affidavit, had merely made a conservative estimate of the value of his shares.

In support of its assertion that representatives of the government were negligent, plaintiff relies on other inconsistencies disclosed by the documents. The deeds covered property held in eleven counties in Tennessee, while the real estate appraisal referred to property in thirteen counties in Tennessee. The real estate appraisal indicated that the land held by Tennessee Land & Development equalled 241,000 acres, while the deeds purportedly transferred to the corporation some 336,000 acres. Lastly, some of the deeds received by defendant stated on their face that the fair market value of the land, as estimated by Rich, the transferor, was $10,000.

At trial, DeWeese testified that she had relied on Roy Crawford, her supervisor, to review the deeds since she was unfamiliar with reading deeds. Crawford

testified that he had read the deeds and knew that the deeds indicated that the fair market value of a number of acres was only $10,000, substantially less than the real estate appraisal. It was Crawford's belief that the fair market value shown on the face of the deeds involved merely the payment of taxes in some respect and did not reflect the actual value of the land. Crawford also testified that the documentation which he had reviewed concerning the net worth of the sureties was sufficient in his judgment for a determination that the sureties were acceptable.

II

Discussion

In denying liability in this case, defendant's principal argument is that it is not subject to suit under the FTCA since its employees, in determining the acceptability of the individual sureties, performed a discretionary function. The liability of the federal government under the FTCA is subject to various exceptions contained in 28 U.S.C. SS 2680. Defendant here relies on § 2680(a), in which the "discretionary function" exception is to be found.

Section 2680(a) provides in pertinent part as follows:

> The provisions of this chapter and section 1346(b) of this title shall not apply to -
>
> (a) Any claim . . . based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused.

This exception marks the boundary between Congress' willingness to impose tort liability upon the United States and its desire to protect certain governmental activities from exposure to suit by private individuals. United States v. S.A. Empresa de Viacao Aerea Rio Grandense (Varig Airlines), 467 U.S. 797, 808 (1984).

It is the nature of the conduct, rather than the status of the actor, that governs whether the discretionary function exception applies in a given case. Varig Airlines, 467 U.S. at 813. Conduct which falls under the exception must necessarily involve an element of judgment or choice. Berkovitz v. United States, 486 U.S. 531, 536 (1988). The violation of a mandatory regulation by an employee will not shield the government from liability because no element of choice is present and the action would be contrary to the stated policy. United

States v. Gaubert, 59 U.S.L.W. 4244, 4246 (March 26, 1991).

Assuming that the challenged conduct involves an element of judgment, a court must also determine whether that judgment is of the kind that the discretionary function exception was designed to shield. Berkovitz, 486 U.S. at 536. If the exercise of judgment is grounded in considerations of social, economic, and political policy, then the discretionary exception applies, and suit is barred. Id. Furthermore, if a regulation allows the employee discretion, the very existence of the regulation creates a strong presumption that a discretionary act authorized by the regulation involves consideration of the same policies which led to the promulgation of the regulation. Gaubert, 59 U.S.L.W. at 4246.

In Dalehite v. United States, 346 U.S. 15 (1953), the Supreme Court held that government employees who operated an agriculture program to provide fertilizer to countries in need were exempt from suit when the fertilizer exploded and caused injury. Similarly, in Varig Airlines, supra, the Supreme Court held that the federal government could not be held liable for injuries arising

from the crash of two airplanes, spot inspections of which had been made by officials of the Federal Aviation Administration (hereinafter the "FAA"). 467 U.S. 797. In Varig Airlines, the respondents had argued that the FAA was negligent in performing spot inspections on the two aircraft because those inspections had not revealed certain defects. The Supreme Court specifically rejected respondent's arguments that the system of spot inspections developed by the FAA should have been more extensive. Two aspects of the certification procedure had been challenged by the respondents, the FAA's decision to implement a "spot check" system of compliance and the application of that system to the particular aircraft involved. Both components of respondents' claim were found by the Supreme Court to be barred by the discretionary function exception to the FTCA. Id. at 819. The Court determined in particular that acts of FAA employees in executing the "spot check" program in accordance with agency doctrines were protected by the discretionary function exception.

In Berkovitz, supra, the Supreme Court ruled that the discretionary function exception would not bar a suit in which it was alleged that government employees had

violated regulations by issuing a license for the release of a vaccine lot without receiving certain test data required by the regulations. 486 U.S. at 542. In so holding, the Court said the following:

> If petitioners' claim is that the DBS (Department of Biologic Standards] made a determination that Orimune complied with regulatory standards, but that the determination was incorrect, the question of the application of the discretionary function exception requires a somewhat different analysis. In that event, the question turns on whether the manner and method of determining compliance with the safety standards at issue involve agency judgment of the kind protected by the discretionary function exception.

Id. at 544.

In Berkovitz, the Court declined to rule on that specific issue because the parties had not addressed it in detail.

In its very recent Gaubert decision, the Supreme Court held that the government could not be held liable for daily decisions made by officials of the Federal Home Loan Bank Board (hereinafter "FHLBB") in operating a failing thrift institution. The Court rejected the distinction made by the Fifth Circuit in that case between policy decisions and operational actions. The Court concluded that the "Day-today management of banking affairs, like the management of other businesses,

regularly require judgment as to which of a range of permissible courses is the wisest." 59 U.S.L.W. at 4247. The Court held that discretionary conduct is not confined to the policy or planning level, but applies as well to the operational or management level of the FHLBB. Id.

Applying the principles of those authorities to the facts of this case, this Court concludes that the FHA employees in question were performing a discretionary function when they determined the acceptability of the individual sureties Rich and Harper. As was the federal agency in Gaubert, the FHA is engaged in the day-today determination of the acceptability of sureties for bonds covering federal highway projects. Decisions pertaining to the net worth of sureties require the exercise of judgment as to a wide range of permissible courses. See 59 U.S.L.W. at 4247.

The applicable regulation here is 48 C.F.R. 28.202-2, which provides as follows:

> (a) Individual sureties are acceptable for all types of bonds except position schedule bonds. The contracting officer shall determine the acceptability of individuals proposed as sureties. At least two individual sureties must execute the bond and the net worth of each individual must equal or exceed the penal amount of the bond. Contracting officers shall consider the number and amounts of other bonds upon which a proposed individual surety is

> bound, and the status of the contracts for which such bonds were furnished, in determining the acceptability of the individual surety. (See the instructions on the reverse of the Standard Form 28, Affidavit of Individual Surety, 53.301-28)
>
> (b) Each individual surety shall execute Standard Form 28. The information provided is helpful in determining the net worth of proposed individual sureties.

Plaintiff argues that certain requirements of this regulation are mandatory and that the discretionary function exception is not applicable in this case because DeWeese and Crawford violated these mandatory requirements in approving the sureties. On the record here, the Court must disagree. Although there are mandatory provisions contained in the regulation, the FHA employees in this case fully complied with those particular requirements. Each individual surety in this case did execute a Standard Form 28. Two individual sureties did execute the bond, and their stated net worth did exceed the penal amount of the bond.

Other provisions of the regulation clearly confer discretionary duties on FHA employees. Section 28.202-2 broadly states that the contracting officer "shall determine the acceptability" of individual sureties. In particular, contracting officers are to determine the net worth of proposed individual sureties, and information

provided in Standard Form 28 is specifically deemed "helpful" in making that determination. However, there is no mandatory requirement concerning the particular steps which must be taken by the contracting officer in determining the net worth of the proposed individual sureties. That is left to the discretion of the FHA employee, to be exercised in accordance with the circumstances of each particular case. The mere fact that decisions of the sort made here by FHA employees were routine or frequent would not be sufficient to remove these otherwise discretionary acts from the scope of the exception. See Gaubert, supra at 4249.

Both DeWeese and Crawford testified at the trial that they had reviewed the affidavits of Rich and Harper and had exercised their judgment in determining to investigate only the sureties' interest in Tennessee Land & Development. DeWeese and Crawford also testified that applicable regulations gave them no guidance concerning the scope of the investigation to be undertaken but left it to them to determine in their discretion the relevant documents to be requested. The language of the applicable regulation fully supports this testimony. The Court would note that § 28.202-2 does

not mandate any particular method for verifying the net worth of an individual surety, but leaves that method in each individual case to the discretion of the FHA representative involved.[1]

This Court further concludes that the exercise of discretion in this case involves an administrative decision grounded in economic policy. Flexibility is provided by the regulation, and employees of the FHA are permitted to conduct their investigation as they determine appropriate in a particular case. As the Supreme Court pointed out in Varig Airlines, supra at 814, Congress by including the discretionary function exception in the FTCA wished to prevent judicial "second-guessing" of administrative decisions grounded in economic policy through the medium of an action in tort.

---

[1] Use of the word "helpful" in the regulation is a clear indication of the agency's intent that the contracting officer exercise discretion in determining the net worth of proposed individual sureties.

It appears that plaintiff is not disputing that the FHA had discretion concerning the extent of any investigation of the net worth of the sureties, including the particular assets to be reviewed and the documents to be procured. Plaintiff does contend, however, that the employee must read the requested documents with due care, and argues that a negligent review of the documents resulting in an incorrect decision is an action for which the government may be held liable. This argument is without merit.

Whether or not a government employee was negligent is not relevant to determining whether discretionary activity is involved. If an employee is engaged in a discretionary function, the exception may be invoked even if the function were performed in a negligent manner. Dalehite, 346 U.S. at 30 ("The bill is not intended to authorize a suit for damages to test the validity of or provide a remedy on account of such discretionary acts even though negligently performed and involving an abuse of discretion"). Thus, the negligent performance of a discretionary function does not subject the government to liability under the Federal Tort

Claims Act. Red Lake Band of Chippewa Indians v. United States, 800 F.2d 1187, 1194 (D.C. Cir. 1986). Absent the violation of a mandatory regulation, conduct by a government employee exercising judgment and choice cannot because of the discretionary function exception result in liability of the government under the FTCA.

From the evidence produced at the trial of this case, this Court finds and concludes that the FHA employees in question were exercising their discretion when they approved Rich and Harper as individual sureties under the required Miller Act bond. As such, this suit under the FTCA is barred by the discretionary function exception set forth in 28 U.S.C. § 2680(a). [2]

III

Conclusion

For all these reasons, this Court concludes that defendant is entitled to judgment in this case. The Clerk is directed to enter such judgment in favor of defendant, with costs.

Alexander Harvey, III, Senior United States District Judge

DATED: May 10, 1991

[2] Inasmuch as the discretionary function exception set forth in 28 U.S.C. § 2680(a) bars any recovery by plaintiff in this case under the FTCA, it is not necessary for the Court to address the additional issues of negligence and proximate cause.

48 C.F.R. § 28.202-2

Individual Sureties.

(a) Individual sureties are acceptable for all types of bonds except position schedule bonds. The contracting officer shall determine the acceptability of individuals proposed as sureties. At least two individual sureties must execute the bond and the net worth of each individual must equal or exceed the penal amount of the bond. Contracting officers shall consider the number and amounts of other bonds upon which a proposed individual surety is bound, and the status of the contracts for which such bonds were furnished, in determining the acceptability of the individual surety. (See the instructions on the reverse of Standard Form 28, Affidavit of Individual Surety, 53.301-28)

(b) Each individual surety shall execute Standard Form 28. The information provided is helpful in determining the net worth of proposed individual sureties.

(c) To ascertain the continuing acceptability of individual sureties, the official executing the Certificate of Sufficiency is required to execute further certificates, as contemplated by Instruction 5 on Standard Form 28, as often as the agency considers it appropriate. Agencies may require further certificates indicating additional assets or a new surety to assure protection of the Government's interest.

The "Discretionary Function Exception" to the Federal Tort Claims Act 28 U.S.C. § 2680 (a)

The provisions of this chapter and section 1346(b) of this title shall not apply to -

(a) Any claim ... based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved may be abused.

Supreme Court, U.S.
FILED
AUG 24 1992
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No. 91-2043

In the Supreme Court of the United States

OCTOBER TERM, 1992

PRICELESS SALES AND SERVICE, INC., PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the discretionary function exception of the Federal Torts Claims Act, 28 U.S.C. 2680(a), protects the United States from liability for the alleged negligence of government contracting officers in determining the acceptability of individuals proposed as sureties.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-6a) is not reported, but it is noted at 959 F.2d 231 (Table). The opinion of the district court (Pet. App. 7a-25a) is not reported.

JURISDICTION

The judgment of the court of appeals was entered on April 1, 1992. The petition for writ of certiorari was filed on June 19, 1992. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Petitioner sued the United States under the Federal Torts Claims Act (FTCA), 28 U.S.C. 1346(b), 2671 *et seq.*, to recover $95,244.04 in losses it sustained as a subcontractor on a Federal Highway Administration (FHA) construction project. Jennings International Corporation, the now-bankrupt general contractor, failed to pay petitioner for materials and labor petitioner supplied for the project, and the payment bond furnished by Jennings proved to be worthless. Petitioner sought to hold the United States liable for the losses it incurred, alleging that FHA employees had been negligent in approving two individuals as sureties for the payment bond that Jennings was required by law to provide. Pet. App. 2a.[1]

The district court heard testimony from two FHA employees who had reviewed the required affidavits in support of the sureties. The court concluded that the FTCA's discretionary function exception, 28 U.S.C. 2680(a), applies to the agency's determination of the acceptability of an individual surety, because the applicable regulation gives the agency discretion in making that decision and that exercise of discretion was grounded in economic policy. Pet. App. 21a-22a. The court noted that the discretionary function exception would protect the United States from liability even if the government employees were negligent in the performance of that discretionary function. *Id.* at 23a-24a.

The court of appeals affirmed. Pet. App. 1a-6a. The court of appeals agreed that the FHA employees' activities in this case were subject to the FTCA's discretionary function exception, noting that petitioner "can

[1] The regulation setting forth requirements for the approval of individual sureties, 48 C.F.R. 28.202-2 (1989), is set out at Pet. App. 26a.

point to no nondiscretionary duty or function that the FHA violated." *Id.* at 5a-6a. The court noted that the relevant regulation did not require rejection of Jennings' sureties. *Id.* at 6a. "What additional information the FHA sought and how the FHA chose to evaluate this information was wholly within the discretion of the FHA, since there is no requirement that the FHA investigate persons proposed as sureties." *Ibid.*

ARGUMENT

1. This Court's decision in *Berkovitz* v. *United States*, 486 U.S. 531 (1988), established a two-part test for applying the discretionary function exception. The court must "first consider whether the action is a matter of choice for the acting employee." *Id.* at 536. If the employee is required to follow a course of action that is specifically prescribed by a federal statute, regulation, or policy, the discretionary function exception does not apply. *Ibid.* If the challenged conduct involves an element of judgment, then the court must additionally determine whether the challenged conduct is of the kind that the discretionary function exception was designed to shield. *Ibid.* "The focus of the inquiry is * * * on the nature of the actions taken and on whether they are susceptible to policy analysis." *United States* v. *Gaubert*, 111 S. Ct. 1267, 1275 (1991).

In this case, the relevant federal regulation directs the FHA to "determine the acceptability of individuals proposed as sureties." 48 C.F.R. 28.202-2(a) (1989). But the steps the agency and its employees take in doing so are almost entirely a "matter of choice" (*Berkovitz*, 486 U.S. at 536).[2] The regulation leaves the method of verifying

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[2] The federal regulation directs only that contracting officers "shall consider the number and amounts of other bonds upon which a proposed individual surety is bound, and the status of the contracts for which such bonds were furnished." 48 C.F.R. 28.202-2(a)

the net worth of an individual surety in each individual case to the discretion of the contracting officer. Pet. App. 21a-22a. The grant of discretion is manifest on the face of the regulation, which notes, for example, that certain information "is helpful in determining the net worth of proposed individual sureties." 48 C. F. R. 28.202-2(b) (1989). Pet. App. 22a n.1.

As was true of the federal agency in *Gaubert* with regard to the banking business, the FHA's "[d]ay-to-day" activities here—*i.e.*, its determinations regarding the acceptability of sureties for bonds covering federal highway projects—"regularly require judgment as to which of a range of permissible courses is the wisest." 111 S. Ct. at 1275. That exercise of discretion is grounded in economic policy and illustrates an important basis for the discretionary function exception: "to prevent judicial 'second-guessing' of legislative and administrative decisions grounded in social, economic and political policy through the medium of an action in tort." *United States* v. *S.A. Empresa de Viacao Aerea Rio Grandense (Varig Airlines)*, 467 U.S. 797, 814 (1984). Pet. App. 22a. Both lower courts in this case properly recognized that the agency action here fell within the FTCA's discretionary function exception. Pet. App. 5a-6a, 18a-19a. See *Gaubert*, 111 S. Ct. at 1274-1279.[3]

2. Petitioner's argument (Pet. 9-13) that the decision below conflicts with this Court's decision in *Berkovitz* is without merit. In that case, the Court found the discretionary function exception inapplicable to claims based

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(1989). As the court of appeals noted, "[t]his requirement is not at issue in the present case." Pet. App. 5a n.4.

[3] Petitioner's attempt to distinguish *Gaubert* (Pet. 12) is unavailing. *Gaubert*'s teachings are no more limited to cases involving "the 'day to day operations' of a business taken over by the government" than are those of *Berkovitz* limited to cases involving the government licensing of polio vaccines.

on Food and Drug Administration regulations that imposed mandatory standards for agency action. See 486 U.S. at 542-545.[4] As both courts below recognized, this case involves a regulation that sets no such applicable mandatory standards. Pet. App. 6a, 19a-22a. Although petitioner accuses FHA personnel of "creat[ing] substitutes for the regulations' requirements" (Pet. 13), and makes repeated references to violation of "regulations" (*id.* at 14-16), it points to no specific violation of any duty mandated by the regulation at issue. See Pet. App. 20a ("Although there are mandatory provisions contained in the regulation, the FHA employees in this case fully complied with those particular requirements."). Petitioner's reliance on *Berkovitz* is accordingly misplaced.

Petitioner also appears to argue that once the agency undertook what petitioner concedes was a discretionary step in deciding to conduct an investigation, the discretionary function exception no longer applied. Pet. 12-13. See Pet. App. 23a. This Court has previously rejected such arguments, quoting a statement in the House Report on the FTCA that the legislation "is not intended to authorize a suit for damages to test the validity of or

[4] More specifically, in *Berkovitz* the Court found the discretionary function exception inapplicable to claims that the agency: (a) issued a license without first receiving data the manufacturer must submit to the agency; (b) licensed the product without determining whether it complied with regulatory standards; and (c) specifically found that the product failed to comply with certain regulatory standards and nonetheless issued a license. 486 U.S. at 542-544. In addition, the Court remanded the case for further consideration of the claim that the agency made a determination of compliance. *Id.* at 545. On remand, the district court found that because the agency determination of compliance involved the exercise of policy judgment, it was immune from judicial review by virtue of the discretionary function exception. *In re Sabin Oral Polio Vaccine Prod. Liab. Litig.*, 743 F. Supp. 410, 415 (D. Md. 1990).

provide a remedy on account of such discretionary acts even though negligently performed and involving an abuse of discretion." *Dalehite* v. *United States*, 346 U.S. 15, 30, 33-34 (1953) (quoting H.R. Rep. No. 2245, 77th Cong., 2d Sess. 10 (1942)). See also *Red Lake Band of Chippewa Indians* v. *United States*, 800 F.2d 1187, 1194 (D.C. Cir. 1986) (the negligent performance of a discretionary function does not subject the government to liability under the FTCA). Petitioner cannot escape the controlling fact that the activity at issue here—determination of the acceptability of sureties—is a discretionary function. Even if the government's investigation was negligent, the FHA's approval of the sureties remains subject to the FTCA's exception for discretionary acts.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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AUGUST 1992